

ERIC C. SOHLGREN, Bar No. 161710
ecs@paynefears.com
LINDLEY P. FRALEY, Bar No. 223421
lpf@paynefears.com
PAYNE & FEARS LLP
Attorneys at Law
4 Park Plaza, Suite 1100
Irvine, CA 92614
Telephone: (949) 851-1100
Facsimile: (949) 851-1212

ERIC A. WELTER
eaw@welterlaw.com
WELTER LAW FIRM PC
720 Lynn Street, Suite B
Herndon, VA 20170
Telephone: (703) 435-8500
Facsimile: (703) 435-8851

Attorneys for Defendant
7-ELEVEN, INC.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

KIMBERLY ALEKSICK,
individually and on behalf of other
members of the general public
similarly situated,

Plaintiffs,

v.

7-ELEVEN, INC., a Texas
Corporation, MICHAEL TUCKER;
an individual; and DOES 1-50,
Inclusive,

Defendants.

CASE NO. 08 CV 0059 J (WMc)
The Hon. Napoleon A. Jones, Jr.

**MEMORANDUM IN SUPPORT OF
DEFENDANT 7-ELEVEN, INC.'S
MOTION FOR JUDGMENT ON
THE PLEADINGS PURSUANT TO
RULE 12(C) OF THE FEDERAL
RULES OF CIVIL PROCEDURE
AND MOTION TO STRIKE**

Hearing Date: March 3, 2008

Time: 8:30 a.m.

Courtroom: 12

Judge: Hon. Napoleon A. Jones, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
A. Procedural History	3
B. Plaintiff's Employment With Tucker	4
C. The Independent Contractor Agreement Between 7-Eleven And Tucker	4
III. LEGAL ARGUMENT	5
A. THE APPLICABLE LEGAL STANDARD	5
B. THE CALIFORNIA LABOR CODE PROVIDES THE EXCLUSIVE STATUTORY REMEDY FOR PLAINTIFF'S ALLEGED INJURIES IN THE FIRST THREE CAUSES OF ACTION	6
C. 7-ELEVEN DID NOT OWE A DUTY OF CARE TO PLAINTIFF	7
1. 7-Eleven Did Not Assume A Duty Of Care To Plaintiff	8
2. 7-Eleven Did Not Owe A Duty Of Care To Plaintiff Under California Law	9
D. PLAINTIFF'S FOURTH, FIFTH AND SIXTH CAUSES OF ACTION FAIL AS A MATTER OF LAW BECAUSE 7-ELEVEN WAS NOT PLAINTIFF'S EMPLOYER	14
E. THE COURT SHOULD STRIKE PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES	17
IV. CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<u>Biankanja v. Irving</u> (1958) 49 Cal.2d 647	11
<u>Bily v. Arthur Young & Co.</u> , 3 Cal.4 th 370 (1992)	10, 11, 12, 14
<u>Branch v. Tunnell</u> , 14 F.3d 449 (9 th Cir. 1994), <i>overruled on other grounds</i> , <u>Galbraith v. County of Santa Clara</u> , 307 F.3d 1119 (9 th Cir. 2002)	8
<u>California Service Station & Auto Repai Ass'n v. American Home Assurance Co.</u> , 73 Cal. Rptr.2d 182 62 Cal.App.4 th 1166 (Cal. App. 1998)	10
<u>Chelkova v. Southland Corp.</u> , 771 N.E.2d 1100 (Ill. App. 2002)	17
<u>Cislav v. Southland Corp.</u> , 4 Cal.App.4 th 1284 (1992)	17
<u>Czechowski v. Tandy Corp.</u> 731 F.Supp. 406 (N.D.Cal. 1990)	18
<u>Daves v. Southland Corp.</u> , 2000 WL 60199 (Wash. App. 2000)	17
<u>Green v. Party City Corp.</u> , 2002 WL 553219 (C.D. Cal. 2002)	9
<u>Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.</u> , 896 F.2d 1542 (9 th Cir. 1989)	8
<u>Hatcher v. Augustus</u> , 956 F.Supp. 387 (E.D.N.Y. 1997)	17
<u>Howell v. Chick-Fil-A, Inc.</u> , 1993 WL 603296 (N.D.Fla. 1993)	17
<u>In re Immune Response Securities Litigation</u> , 375 F.Supp.2d 983 (S.D.Cal. 2005)	8
<u>In re Wal-Mart Stores, Inc. Wage and Hour Litigation</u> , 505 F.Supp.2d 609 (N.D. Cal. 2007)	9, 18
<u>Isenberg v. California Employment Stabilization Comm'n</u> , 30 Cal.2d 34, 180 P.2d 11 (1947)	16
<u>Jackson v. Roe</u> , 273 F.3d 1192 (9 th Cir. 2001)	10
<u>Johnson v. Metropolitan Sewer Dist.</u> , 926 F.Supp. 874 (E.D.Mo. 1996)	18
<u>Moody v. Industrial Accident Comm'n</u> , 204 Cal. 668, 269 P. 542 (1928)	16
<u>Natori v. Roofing & Waterproofing Forensics, Inc.</u> , 2005 WL 1660635 (Cal. App. 2005) (unpublished)	13
<u>Nichols v. Keller</u> , 15 Cal.App.4 th 1672, 19 Cal. Rptr.2d 601 (1993)	15

1	<u>Pulido v. Coca-Cola Enterp., Inc.</u> , 2006 WL 1699328 (C.D. Cal. 2006).....	9
2	<u>Quelimane Co. v. Stewart Title Guaranty Co.</u> , (1998) 19 Cal.4th 26, 77 Cal.Rptr.2d	
3	709, 960 P.2d 513	14
4	<u>Reynolds v. Bement</u> , 32 Cal.Rptr.3d 483, 36 Cal.4 th 1075, 116 P.3d 1162 (2005) 16	
5	<u>Rice v. Center Point, Inc.</u> , 65 Cal. Rptr.3d 312, 154 Cal.App.4 th 949 (Cal. App.	
6	2007)	10
7	<u>Rojo v. Kliger</u> , 52 Cal.3d 65 (1999)	9
8	<u>Roth v. Garcia Marquez</u> , 942 F.2d 617 (9th Cir. 1991).....	8
9	<u>Sanchez v. Lindsey Morden Claims Services, Inc.</u> (1999) 72 Cal.App.4th 249 ...	13,
10	14	
11	<u>Sprint Telephony PCS, L.P. v. County of San Diego</u> , 311 F.Supp.2d 898 (S.D.Cal.	
12	2004)	8, 11, 17
13	<u>Steckman v. Hart Brewing Inc.</u> , 143 F.3d 1293 (9 th Cir. 1998).....	8
14	<u>Stolz v. Wong Comm. Ltd. Partnership</u> , 25 Cal.App.4 th 1811 (Cal. App. 1994) ...	10
15	<u>Thomas v. Home Depot USA, Inc.</u> , 2007 WL 2854259 (N.D.Cal. 2007).....	9
16	<u>Tieberg v. Unemployment Insurance Appeals Bd.</u> , 2 Cal.3d 943, 88 Cal.Rptr. 175,	
17	471 P.2d 975 (1970)	16
18	<u>Turnbull & Turnbull v. ARA Transp., Inc.</u> , 219 Cal.App.3d 811 (1990)	18
19	<u>Western Mining Council v. Watt</u> , 643 F.2d 618 (9 th Cir. 1981), <u>cert. denied</u> , 454	
20	U.S. 1031 (1981).....	8
21	<u>Wickham v. Southland Corp.</u> , 168 Cal.App.3d 49, 213 Cal.Rptr. 825 (1985). 16, 17	

Statutes

23	Cal. Bus. & Prof. Code § 17200	15
24	Cal. Labor Code § 226	15
25	Cal. Labor Code § 2699(a).....	16
26	Cal. Labor Code 226.7(a).....	15
27	Cal. Labor Code 226.7(b).....	15
28	Cal. Labor Code 2802(a).....	15

1 Cal. Labor Code 512(a)..... 15

2 Singh v. 7-Eleven, Inc., 2007 WL 715488, *7 (N.D.Cal. 2007) 16, 17

3 **Rules**

4 Fed. R. Civ. Pro. 12(c) 8

1 Defendant 7-Eleven, Inc. ("7-Eleven"), by counsel, has moved this Court for
2 judgment on the pleadings on Plaintiff's First Amended Complaint pursuant to
3 Rule 12(c) of the Federal Rules of Civil Procedure on the ground that the First
4 Amended Complaint fails to state a claim upon which relief may be granted against
5 7-Eleven as a matter of law. 7-Eleven has also moved to strike Plaintiff's claim for
6 punitive damages pursuant to Rule 12(f).

7 I. INTRODUCTION

8 This case is an illegitimate attempt to impose liability on 7-Eleven for the
9 alleged wage and hour violations of a single 7-Eleven franchisee in Brawley,
10 California. The California courts have repeatedly upheld the independent
11 contractor relationship between 7-Eleven and its franchisees, holding that 7-Eleven
12 is not the employer of its franchisee's employees nor are its franchisees agents of
13 7-Eleven. Indeed, there is a paucity of reported decisions nationwide holding
14 franchisors liable for the wage and hour violations of its franchisee.

15 Undeterred by the overwhelming legal authority against her position,
16 Plaintiff Kimberly Aleksick ("Plaintiff") brings a multitude of claims against
17 7-Eleven in this proceeding based on the bald allegation that 7-Eleven was her
18 "employer." Plaintiff is a former employee of Defendant Michael Tucker
19 ("Tucker"). Tucker operates a 7-Eleven food store in Brawley, California, as a
20 franchisee pursuant to a written independent contractor agreement with 7-Eleven.
21 Plaintiff's original Complaint in the Superior Court for Imperial County,
22 California, sought relief against the defendants for various alleged violations of the
23 California Labor Code.

24 Perhaps recognizing the significant weakness of the claims in her original
25 Complaint (which relied entirely on the assertion that 7-Eleven was her employer),
26 Plaintiff filed a First Amended Complaint. The First Amended Complaint contains
27 six causes of action: (1) negligence; (2) negligence per se; (3) negligent
28 interference with prospective economic advantage; (4) violation of California

1 Labor Code; (5) violation of Business and Professions Code section 17200; and (6)
2 violation of California Labor Code section 2699. The first three causes of action
3 are new. In those claims, Plaintiff seeks to impose direct liability on 7-Eleven
4 through a novel "negligent payroll" theory. This novel theory, however, has no
5 legal basis under California law. Furthermore, despite eight months of discovery,
6 Plaintiff's First Amended Complaint contains no new factual allegations that
7 would support her bald assertion that 7-Eleven was her employer.

8 The new causes of action in the First Amended Complaint (Negligence;
9 Negligence Per Se; Negligent Interference With Prospective Economic Advantage)
10 fail to state a claim upon which relief may be granted for several reasons. First, all
11 three claims fail as a matter of law because the California Labor Code provides the
12 exclusive statutory remedy for Plaintiff's alleged injuries. Second, even if
13 Plaintiff's negligence claims are not preempted by the California Labor Code, all
14 three negligence claims fail as a matter of law because 7-Eleven did not owe
15 Plaintiff a duty of care with respect to the alleged conduct.

16 7-Eleven is also entitled to judgment as a matter of law on Plaintiff's Fourth
17 (California Labor Code), Fifth (Bus. & Prof. Code § 17200) and Sixth Causes
18 (California Labor Code § 2699) of Action in the First Amended Complaint because
19 7-Eleven was not Plaintiff's employer. Although the First Amended Complaint
20 contains the bald assertion that 7-Eleven was Plaintiff's employer, it fails to allege
21 specific facts supporting that assertion. Ordinarily, the bald assertion that 7-Eleven
22 was Plaintiff's employer might suffice to survive a motion for judgment on the
23 pleadings. In this case, however, the franchise agreement between 7-Eleven and
24 Tucker that is appended to the First Amended Complaint directly contradicts
25 Plaintiff's assertion. That agreement expressly provides that the relationship
26 between Tucker and 7-Eleven is an independent contractor relationship and that
27 7-Eleven has no control over Tucker's employees or the means or manner of the
28 operation of his store. Because the agreement is appended to, and referenced in,

1 Plaintiff's First Amended Complaint, the Court must accept these facts as true for
2 purposes of this motion and must disregard Plaintiff's conclusory allegation to the
3 contrary. Because the uncontradicted allegations of the First Amended Complaint
4 and the provisions of the franchise agreement, when taken as true, establish that
5 7-Eleven was not Plaintiff's employer, 7-Eleven cannot be held liable on Plaintiff's
6 Fourth, Fifth or Sixth Causes of Action as a matter of law.

7 If the Court dismisses Plaintiff's negligence claims but allows the California
8 Labor Code and/or Section 17200 claims to proceed against 7-Eleven, 7-Eleven
9 has also moved to strike Plaintiff's claim for punitive damages. Neither the
10 California Labor Code claims nor the Section 17200 claim allow the recovery of
11 punitive damages under California law.

12 **II. STATEMENT OF FACTS**

13 **A. Procedural History.**

14 On or about April 16, 2007, Plaintiff filed a Complaint against 7-Eleven and
15 its franchisee Tucker in the Superior Court for the State of California, County of
16 Imperial. The original Complaint contained several causes of action based on
17 alleged violations of the California Labor Code by Tucker. The first cause of
18 action alleged violations of the California Labor Code by Tucker for failure to
19 provide meal or rest breaks, failure to pay overtime compensation, requiring
20 employees to pay for uniforms, and noncompliant wage stubs. The second cause
21 of action alleged a claim under Business and Professions Code § 17200 for the
22 same alleged violations. 7-Eleven is named a defendant on both causes of action
23 based on the allegation that it was Plaintiff's employer.

24 On December 17, 2007, after eight months of discovery, 7-Eleven received
25 Plaintiff's First Amended Complaint by facsimile. The First Amended Complaint
26 is a substantially new complaint. It includes new claims against 7-Eleven that are
27 fundamentally different from those in the original Complaint. The new claims
28 include negligence, negligence per se, and negligence interference with prospective

1 economic advantage, and a claim for penalties under California Labor Code
2 § 2699. Plaintiff's negligence claims seek to impose direct liability on 7-Eleven
3 for its practices in providing payroll services to its franchisees. Thus, the new
4 negligence claims do not depend on a finding that 7-Eleven was Plaintiff's
5 employer. 7-Eleven removed the case to federal court on January 10, 2008.

6 **B. Plaintiff's Employment With Tucker.**

7 Plaintiff began her employment with Tucker in 2005 as a Sales Associate.
8 (*First Amd. Compl.* ¶ 20). Plaintiff was employed through February 20, 2007.
9 (*Id.*)

10 **C. The Independent Contractor Agreement Between 7-Eleven And**
11 **Tucker.**

12 Plaintiff acknowledges that a franchise agreement existed between 7-Eleven
13 and Tucker and has attached an excerpt of the agreement as Exhibit D to the First
14 Amended Complaint. (*First Amd. Compl.* ¶ 21 & Ex. D). Plaintiff further alleges
15 that as part of the franchise relationship, 7-Eleven agreed to provide payroll
16 services to Tucker. (*Id.* ¶ 20). 7-Eleven has lodged a copy of the agreement with
17 the Court. (*Declaration of Eric A. Welter* ¶ 2 & Ex. A [hereafter *Franchise Agr.*]).

18 Plaintiff alleges that, pursuant to the franchise agreement, 7-Eleven
19 configured and processed the payroll for Tucker. (*First Amd. Compl.* ¶ 20).
20 Paragraph 12 of the franchise agreement provides that the franchisee agrees to
21 "prepare and furnish to" 7-Eleven "time and wage authorizations for your Store
22 employees." (*Franchise Agr.* ¶ 12(c)(1)). The franchise agreement contains the
23 explicit acknowledgment of the franchisee that 7-Eleven is "relying on the
24 accuracy of all information you and your employees provide, including all payroll
25 information." (*Id.* ¶ 12(c)(3)). The franchise agreement further provides that "all
26 information that you [Tucker] and your employees provide will be truthful,
27 accurate, complete and in compliance with all applicable laws." (*Id.* Ex. D, ¶

1 12(c)(3)). The franchisee also agrees “at all times [to] use the 7-Eleven Payroll
2 System in accordance with our standards.” (*Id.* ¶ 19(h)).

3 The franchise agreement also establishes an independent contractor
4 relationship between Tucker and 7-Eleven. Paragraph 2 of the franchise agreement
5 provides:

6 **2. Independent Contractor.** You and we agree that this Agreement
7 creates an arm’s-length business relationship and does not create any
8 fiduciary, special or other similar relationship. You agree: (a) to hold
9 yourself out to the public as an independent contractor; (b) to control the
10 manner and means of the operation of the Store; and (c) to exercise complete
11 control over and responsibility for all labor relations and the conduct of your
12 agents and employees, including the day-to-day operations of the Store and
13 all Store employees. You and your agents and employees may not: (i) be
14 considered or held out to be our agents or employees or (ii) negotiate or
15 enter any agreement or incur any liability in our name, on our behalf, or
16 purporting to bind us or any of our or your successors-in-interest. Without
17 in any way limiting the preceding statements, we do not exercise any
18 discretion or control over your employment policies or employment
19 decisions. All employees of the Store are solely your employees and you
20 will control the manner and means of the operation of the Store. No actions
21 you, your agents or employees take will be attributable to us or be
22 considered to be actions obligating us.

23 (*Id.* ¶ 2).

24 **III. LEGAL ARGUMENT**

25 **A. THE APPLICABLE LEGAL STANDARD.**

26 After the pleadings are closed, any party may move for judgment on the
27 pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Fed. R.
28 Civ. Pro. 12(c). Judgment on the pleadings is appropriate if, assuming the truth of

1 all material facts pled in the complaint, the moving party is nonetheless entitled to
 2 judgment as a matter of law. Hal Roach Studios, Inc. v. Richard Feiner & Co.,
 3 Inc., 896 F.2d 1542, 1550 (9th Cir. 1989).

4 The court may consider material that is attached to the complaint on a
 5 motion for judgment on the pleadings. In re Immune Response Securities
 6 Litigation, 375 F.Supp.2d 983, 994-95 (S.D.Cal. 2005). The court must limit its
 7 review to documents attached to, or referenced by, the complaint. See Branch v.
 8 Tunnell, 14 F.3d 449, 453 (9th Cir. 1994), *overruled on other grounds*, Galbraith v.
 9 County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). "If a complaint is
 10 accompanied by attached documents, the court is not limited by the allegations
 11 contained in the complaint. These documents are part of the complaint and may be
 12 considered in determining whether the plaintiff can prove any set of facts in
 13 support of the claim." Roth v. Garcia Marquez, 942 F.2d 617, 625 n.1 (9th Cir.
 14 1991).

15 "[T]he court does not have to accept as true conclusory allegations that
 16 contradict facts that may be judicially noticed or that are contradicted by
 17 documents referred to in the complaint." Sprint Telephony PCS, L.P. v. County of
 18 San Diego, 311 F.Supp.2d 898, 903 (S.D.Cal. 2004) (citing Steckman v. Hart
 19 Brewing Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998)). Moreover, "the court need
 20 not accept as true unreasonable inferences or conclusory legal allegations cast in
 21 the form of factual allegations." Id. (citing Western Mining Council v. Watt, 643
 22 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981)).

23 **B. THE CALIFORNIA LABOR CODE PROVIDES THE**
 24 **EXCLUSIVE STATUTORY REMEDY FOR PLAINTIFF'S ALLEGED**
 25 **INJURIES IN THE FIRST THREE CAUSES OF ACTION.**

26 Plaintiff's first three causes of action contain common law tort claims based
 27 on alleged injuries that are compensable under the California Labor Code. Indeed,
 28 Plaintiff's negligence claims are based on the exact same conduct that forms the

1 basis for her Labor Code claims. Because the California Labor Code provides the
 2 exclusive statutory remedy for Plaintiff's alleged injuries, the Court should dismiss
 3 the First, Second and Third Causes of Action with prejudice.

4 "Under California law, where a statute creates a right that did not exist at
 5 common law and provides a comprehensive and detailed remedial scheme for its
 6 enforcement, the statutory remedy is exclusive." In re Wal-Mart Stores, Inc. Wage
 7 and Hour Litigation, 505 F.Supp.2d 609, 618 (N.D. Cal. 2007) (citing Rojo v.
 8 Kliger, 52 Cal.3d 65, 79 (1999)). Based on this rule, the courts have repeatedly
 9 dismissed common law claims based upon the same set of facts as alleged Labor
 10 Code violations. Id. at 618-19 (dismissing common law claim based on same
 11 conduct as Labor Code claims for failure to pay overtime, late payment of wages at
 12 termination, nonpayment of accrued vacation and failure to accurately report
 13 wages); see also Thomas v. Home Depot USA, Inc., 2007 WL 2854259 (N.D.Cal.
 14 2007) (failure to provide meal and rest breaks and late payment of wages); Pulido
 15 v. Coca-Cola Enterp., Inc., 2006 WL 1699328 (C.D. Cal. 2006) (failure to provide
 16 meal and rest breaks and/or pay penalties, nonpayment of wages at discharge, and
 17 failure to provide itemized wage statements); Green v. Party City Corp., 2002 WL
 18 553219 (C.D. Cal. 2002) (failure to pay overtime). Because Plaintiff's negligence
 19 claims here are based entirely on the same conduct that forms the basis for her
 20 Labor Code claims, Plaintiff's Labor Code claims provide her with the exclusive
 21 statutory remedy and preclude her common law negligence claims. Accordingly,
 22 the Court should grant the instant motion and dismiss the First, Second and Third
 23 Causes of Action with prejudice.

24 **C. 7-ELEVEN DID NOT OWE A DUTY OF CARE TO**
 25 **PLAINTIFF.**

26 In order for Plaintiff to proceed on her First, Second and Third Causes of
 27 Action, this Court must find – as a matter of law – that 7-Eleven owed Plaintiff a
 28

1 duty of care. Because no such duty of care existed here, the Court should dismiss
2 Plaintiff's negligence claims.

3 Under California law, "the threshold element of a cause of action for
4 negligence is the existence of a duty to use due care toward an interest of another
5 that enjoys legal protection against unintentional invasion." Jackson v. Roe, 273
6 F.3d 1192, 1196 (9th Cir. 2001). Likewise, Plaintiff's negligence per se and
7 negligent interference with prospective economic advantage claims require a
8 threshold finding that a duty of care exists. Rice v. Center Point, Inc., 65 Cal.
9 Rptr.3d 312, 319, 154 Cal.App.4th 949, 959 (Cal. App. 2007); California Service
10 Station & Auto Repai Ass'n v. American Home Assurance Co., 73 Cal. Rptr.2d
11 182, 191-92, 62 Cal.App.4th 1166, 1180 (Cal. App. 1998); Stolz v. Wong Comm.
12 Ltd. Partnership, 25 Cal.App.4th 1811, 1825 (Cal. App. 1994) (the tort of negligent
13 interference with economic relationship arises only when the defendant owes the
14 plaintiff a duty of care). Whether a duty of care exists is a question of law. Bily v.
15 Arthur Young & Co., 3 Cal.4th 370, 397 (1992).

16 **1. 7-Eleven Did Not Assume A Duty Of Care To Plaintiff.**

17 Plaintiff alleges that 7-Eleven "assumed" a duty of care with respect to
18 Plaintiff through the franchise agreement. (*First Amd. Compl.* ¶ 21, 24). This is
19 the sole allegation regarding the alleged duty of care owed by 7-Eleven to Plaintiff.
20 Plaintiff's position in this regard is fatally flawed for several reasons.

21 First, the assertion that 7-Eleven assumed any duty of care with respect to
22 Tucker's employees is directly contradicted by paragraph 2 of the franchise
23 agreement. Paragraph 2 expressly provides that Tucker is an independent
24 contractor, that Tucker controls the manner and means of the operation of the
25 Store, that Tucker exercises complete control over and responsibility for all labor
26 relations and the conduct of his agents and employees, including the day-to-day
27 operations of the Store and all Store employees and that 7-Eleven does not exercise
28 any discretion or control over Tucker's employment policies or employment

1 decisions. (*Franchise Agr.* ¶ 2). In fact, the agreement expressly provides that
 2 “[a]ll employees of the Store are solely [Tucker’s] employees and [Tucker] will
 3 control the manner and means of the operation of the Store.” (*Id.*) Given these
 4 statements, which must be accepted as true for purposes of this motion, Plaintiff
 5 cannot seriously contend that 7-Eleven assumed *any* duty with respect to Tucker’s
 6 employees. On the contrary, 7-Eleven expressly *disclaimed* any such duty by these
 7 provisions.

8 Plaintiff relies entirely on the assertion that 7-Eleven assumed a duty of care
 9 in the franchise agreement to support her negligence claims. Because the franchise
 10 agreement contradicts that assertion, however, the Court must disregard the
 11 allegation and find that no duty of care exists between 7-Eleven and Plaintiff in
 12 this case. See Sprint, 311 F.Supp.2d at 903 (“[T]he court does not have to accept
 13 as true conclusory allegations that contradict facts that . . . are contradicted by
 14 documents referred to in the complaint.”). Because 7-Eleven did not owe Plaintiff
 15 a duty of care as a matter of law, this Court should grant the instant motion and
 16 dismiss the First, Second and Third Causes of Action with prejudice.

17 **2. 7-Eleven Did Not Owe A Duty Of Care To Plaintiff Under**
 18 **California Law.**

19 The recognition of a duty of care is a question of policy. Bily v. Arthur
 20 Young & Co. (1992) 3 Cal.4th 370, 397 (“Bily”). The concept of duty is invoked
 21 to limit the “otherwise potentially infinite liability which would follow from every
 22 negligent act” *Id.* The determination of whether a defendant owes a duty of care
 23 in a specific case involves a balancing of various factors. The California Supreme
 24 Court has “employed a checklist of factors to consider in assessing legal duty in
 25 the absence of privity of contract between a plaintiff and a defendant.... ‘The
 26 determination of whether in a specific case the defendant will be held liable to a
 27 third person not in privity is a matter of policy and involves the balancing of
 28 various factors, among which are [1] the extent to which the transaction was

1 intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree
2 of certainty that the plaintiff suffered injury, [4] the closeness of the connection
3 between defendant's conduct and the injury suffered, [5] the moral blame attached
4 to the defendant's conduct, and [6] the policy of preventing future harm.'" Id. at
5 397-98 (citing Biankanja v. Irving (1958) 49 Cal.2d 647, 650)

6 Foreseeability, standing alone, is insufficient to impose liability for negligent
7 conduct. Bily, 3 Cal.4th at 399. Even when foreseeability is present, courts have
8 "declined to allow recovery on a negligence theory when damage awards
9 threatened to impose liability out of proportion to fault or promote virtually
10 unlimited responsibility for intangible injury." Id. at 398.

11 Bily involved a claim against auditors by investors who allegedly purchased
12 stock relying on negligently prepared financial reports. The California Supreme
13 Court, emphasizing that policy concerns must be considered before a duty could be
14 found, found the auditor's role in the financial reporting process to be secondary
15 and the potential liability it would face in a negligence suit by a third party
16 massive. Bily, 3 Cal.4th at 400. In the court's analysis, this disproportion between
17 fault and injury militated against imposing a duty of care on the defendants. Id.
18 The court also concluded that the costs of imposing a duty outweighed the benefits.
19 Id. at 404-05. After analyzing these concerns, the court held that the auditors owed
20 no duty of care to the investors and were liable only to their clients for negligent
21 preparation of financial statements - not to third parties who were strangers to the
22 contract. Id. at 406 ("[A]n auditor's liability for general negligence in the conduct
23 of an audit of its financial statements is confined to the client, i.e., the person who
24 contracts for or engages the audit services. Other persons may not recover on a
25 pure negligence theory.").

26 The policy considerations applied in Bily weigh against imposing a duty of
27 care on 7-Eleven in its role as a payroll service provider to Plaintiff, who was a
28 stranger to the contract between 7-Eleven and its franchisee. Imposing a duty of

1 care on 7-Eleven as a payroll service provider would impose potential liability that
2 is completely disproportionate to 7-Eleven's fault for any alleged injuries to
3 Plaintiff. 7-Eleven processed payroll based on information provided by Tucker,
4 the franchisee. (*Franchise Agr.* ¶ 12(c)(3)). Tucker agreed to provide 7-Eleven
5 with accurate data and to act in compliance with applicable laws. (*Id.*). Tucker
6 further acknowledged that 7-Eleven was "relying on the accuracy of all
7 information [Tucker] and your employees provide, including all payroll
8 information." (*Id.* ¶ 12(c)(3)). Imposing a duty on 7-Eleven in this context would
9 also be unlikely to enhance deterrence of future mistakes because 7-Eleven has a
10 contractual right to rely upon its franchisees to provide accurate payroll data.
11 (*First Amd, Compl.* 20 & Ex. D, *Franchise Agr.* ¶ 12(c)(3)). Imposing liability on
12 7-Eleven for the alleged violations of its franchisee would be completely out of
13 proportion to fault. See Natori v. Roofing & Waterproofing Forensics, Inc., 2005
14 WL 1660635 *5 (Cal. App. 2005) (unpublished).

15 A comparison to the decision in Sanchez v. Lindsey Morden Claims
16 Services, Inc. (1999) 72 Cal.App.4th 249 is illustrative. Relying on the factors
17 discussed in Bily, the court in Sanchez concluded that an independent insurance
18 adjuster engaged by an insurer owed no duty of care to the claimant-insured with
19 whom the adjuster had no contract. In Sanchez, the plaintiff-insured made a claim
20 with its insurance carrier for damage to a commercial dryer. The plaintiff advised
21 the insurance company that immediate repairs were necessary because the dryer's
22 purchaser was suffering business loss. The insurance company hired defendant, a
23 claims adjuster, to investigate and adjust the loss. The plaintiff's claim was not
24 paid for three months. Plaintiff sued the insurance company and the defendant on
25 a negligence theory.

26 In holding that the defendant claim adjuster owed no duty of care to the
27 insured, the court in Sanchez noted that the insurance company, not the adjuster,
28 was in contractual privity with the insured. Sanchez, 72 Cal.App.4th at 253. The

insurer, not the adjuster, had the power to grant or deny benefits under the policy. The insurer, unlike the adjuster, also had the ability to limit its exposure by contract. Consequently, the court reasoned that imposing a negligence duty on the adjuster would subject it to liability greater than that faced by its principal, the insurer, although the adjuster's role was secondary to the insurer's. Id. Additionally, imposing such a duty would subject the adjuster to conflicting loyalties: "An adjustor owes a duty to the insurer who engaged him. A new duty to the insured would conflict with that duty, and interfere with its faithful performance. This is poor policy." Id. Moreover, little benefit would be gained from imposing a duty on the adjuster: "Adjusters are already deterred from engaging in negligent conduct by exposure to liability to the insurer, and the insured can already seek damages from the insurer for unreasonable investigation and claims handling." Id. at 253-54.

Here, 7-Eleven's contractual relationship was with Tucker. Sanchez, 72 Cal.App.4th at 253. It is undisputed that 7-Eleven and Plaintiff have no contractual privity. Just as in Sanchez, where the adjuster had no power to grant or deny benefits to the insured, 7-Eleven as a payroll service provider had no power to grant or deny wages to Plaintiff. Tucker, not 7-Eleven, had the power to provide Plaintiff with payment by completing time and wage authorizations. Tucker, not 7-Eleven, had the power to control Plaintiff's overtime pay and wage rates. 7-Eleven, in its capacity as a payroll service provider, had no rights in regard to Plaintiff's meal and rest breaks, overtime pay, pay rate or any employee relations. 7-Eleven merely processed payroll based on data provided by Tucker. Thus, because 7-Eleven's role to process payroll for Tucker was secondary to Tucker's role as Plaintiff's employer, imposing liability upon 7-Eleven would result in equal or greater liability being placed on 7-Eleven. This justified the Sanchez court's decision not to extend a duty of care to third-party adjusters. It should support such a conclusion here as well.

Further, the law does not permit recovery in negligence for economic loss alone. In the context of claims based on pure negligence in providing professional services, liability is primarily confined to the client, i.e., the person who contracts for the professional services. Bily, 3 Cal.4th at 406. "Recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law." Quelimane Co. v. Stewart Title Guaranty Co., (1998) 19 Cal.4th 26, 58, 77 Cal.Rptr.2d 709, 960 P.2d 513. Where the effect is merely to cause economic loss, the law does not recognize liability to a third person, except where a duty is created by statute. Sanchez, 72 Cal.App.4th at 255 (citing 2 *Witkin, Summary of Cal. Law* (9th ed. 1987) Agency and Employment, § 149). There is no such statutory duty here. Moreover, imposing a duty on 7-Eleven for wage and hour violations would provide Plaintiff with another source of recovery, and would be redundant since Plaintiff can already seek damages from her employer (i.e. Tucker) for wage and hour law violations. Id. at 254.

Under these circumstances, it is apparent that the 7-Eleven's intent in entering into the agreement with Tucker, as part of the Franchise Agreement, was to protect its *own* interests of ensuring its franchise system is operated in compliance with its operational standards. 7-Eleven cannot be required to prevent economic losses occurring due to financial transactions between Tucker and third parties. See Quelimane Co., 19 Cal.4th at 59, 77 ("In the business arena it would be unprecedented to impose a duty on one actor to operate a business that would ensure the financial success of transactions between third parties. With rare exceptions, a business entity has no duty to prevent financial loss to others with whom it deals directly.").

"A determination that defendants owe plaintiff no duty of care would negate an essential element of plaintiff's cause of action for [professional] negligence and would constitute a complete defense." Nichols v. Keller, 15 Cal.App.4th 1672,

1 1682, 19 Cal. Rptr.2d 601 (1993). As such, Plaintiff's First, Second and Third
 2 claims based on negligence should be dismissed with prejudice.

3 **D. PLAINTIFF'S FOURTH, FIFTH AND SIXTH CAUSES OF**
 4 **ACTION FAIL AS A MATTER OF LAW BECAUSE 7-ELEVEN WAS NOT**
 5 **PLAINTIFF'S EMPLOYER.**

6 The First Amended Complaint, when considered with the franchise
 7 agreement that is appended thereto and referenced therein, establishes that
 8 7-Eleven and Tucker are in an independent contractor relationship and that
 9 7-Eleven has no control over the labor relations at Tucker's store. The First
 10 Amended Complaint contains no specific factual allegations to suggest otherwise.
 11 Taking the allegations of the First Amended Complaint and documents appended
 12 thereto as true, 7-Eleven was not Plaintiff's employer. Because such a finding is
 13 necessary to support liability on Plaintiff's Fourth, Fifth and Sixth Causes of
 14 Action, this Court should dismiss those claims with prejudice.

15 Plaintiff's Fourth Cause of Action arises under various sections of the
 16 California Labor Code. Each of the sections cited in the First Amended Complaint
 17 requires a finding that the defendant is the plaintiff's employer in order for liability
 18 to attach. Cal. Labor Code §§ 226 ("Every *employer* shall . . . furnish each of his
 19 or her *employees* . . ."); 226.7(a) ("No *employer* shall require any *employee* . . .");
 20 226.7(b) ("If an *employer* fails to provide an *employee* . . ."); 512(a) ("An
 21 *employer* may not employ an *employee* . . ."); 2802(a) ("An *employer* shall
 22 indemnify his or her *employee* . . .") (emphasis added). Plaintiff's Fifth Cause of
 23 Action, under California Business & Professions Code § 17200, is based upon the
 24 same underlying violations of the California Labor Code as the Fourth Cause of
 25 Action. (*First Amd. Compl.* ¶¶ 64, 68). Plaintiff's Sixth Cause of Action arises
 26 under California Labor Code § 2699, which creates a cause of action by which
 27 civil penalties may "be recovered through a civil action brought by an aggrieved
 28 *employee* on behalf of himself or herself and other current or former employees

pursuant to the procedures specified in Section 2699.3.” Cal. Labor Code § 2699(a) (emphasis added). The statute defines “aggrieved employee” as “any person who was *employed by the alleged violator* and against whom one or more of the alleged violations was committed.” Id. § 2699(c) (emphasis added). Thus, on the face of the statutes relied upon by Plaintiff in her First Amended Complaint, the viability of all three causes of action hinges upon a finding that 7-Eleven was Plaintiff’s employer.

The terms “employer,” “employee,” and “employ” are not specifically defined in the Wages, Hours, and Working Conditions sections of the California Labor Code. See Reynolds v. Bement, 32 Cal.Rptr.3d 483, 491, 36 Cal.4th 1075, 1087, 116 P.3d 1162 (2005). Therefore, as one court has noted:

California courts have consistently recognized that the principle test for determining employment relationships is the right of control over the manner or means of accomplishing the result desired. Isenberg v. California Employment Stabilization Comm’n, 30 Cal.2d 34, 39, 180 P.2d 11 (1947); Wickham v. Southland Corp., 168 Cal.App.3d 49, 54, 213 Cal.Rptr. 825 (1985). “If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established.” Tieberg v. Unemployment Insurance Appeals Bd., 2 Cal.3d 943, 946-47, 88 Cal.Rptr. 175, 471 P.2d 975 (1970) (citing Moody v. Industrial Accident Comm’n, 204 Cal. 668, 670, 269 P. 542 (1928)). Strong evidence of the right to control is shown by the right to discharge the worker. Isenberg, 30 Cal.2d at 39, 180 P.2d 11. Singh v. 7-Eleven, Inc., 2007 WL 715488, *7 (N.D.Cal. 2007).

In this case, Plaintiff alleges in paragraph 20 of the First Amended Complaint that she was employed by both defendants. (*First Amd. Compl.* ¶ 20). The only specific allegation regarding 7-Eleven’s right to control her employment is conclusory – “both Defendants exercised control over the wages, hours and/or

1 working conditions of Plaintiff and her fellow employees, and both Defendants
 2 possessed the right to terminate Plaintiff's employment." (*Id.*) The Court does not
 3 have to accept these allegations as true, however, because they are contradicted by
 4 the franchise agreement that Plaintiff has made a part of her First Amended
 5 Complaint. See Sprint, 311 F.Supp.2d at 903 ("[T]he court does not have to accept
 6 as true conclusory allegations that contradict facts that . . . are contradicted by
 7 documents referred to in the complaint."). The franchise agreement expressly
 8 provides that *Tucker* – not 7-Eleven – "exercise[s] complete control over and
 9 responsibility for all labor relations and the conduct of [his] agents and employees,
 10 including the day-to-day operations of the Store and all Store employees."
 11 (*Franchise Agr.* ¶ 2). Under California law, these facts actually establish an
 12 independent contractor relationship.

13 In fact, the California courts have repeatedly upheld the independent
 14 contractor relationship between 7-Eleven and its franchisees, holding that 7-Eleven
 15 is not the employer of its franchisee's employees nor is it an agent of the
 16 franchisee. Singh v. 7-Eleven, Inc., 2007 WL 715488 (N.D.Cal. 2007); Cislav v.
 17 Southland Corp., 4 Cal.App.4th 1284 (1992); Wickham v. Southland Corp., 168
 18 Cal.App.3d 49 (1985); see also Chelkova v. Southland Corp., 771 N.E.2d 1100 (Ill.
 19 App. 2002); Daves v. Southland Corp., 2000 WL 60199 (Wash. App. 2000);
 20 Hatcher v. Augustus, 956 F.Supp. 387 (E.D.N.Y. 1997). Indeed, there is a paucity
 21 of reported decisions nationwide holding franchisors liable for the wage and hour
 22 violations of its franchisee. See, e.g., Howell v. Chick-Fil-A, Inc., 1993 WL
 23 603296, *2 n.2 (N.D.Fla. 1993) (noting in FLSA case brought by employee of
 24 franchisee against franchisor that that court has "not discovered a reported case in
 25 which a franchisor has been held liable to an employee of an independent
 26 contractor.").

27 Because the First Amended Complaint does not contain specific factual
 28 allegations to support the bald assertion that 7-Eleven was Plaintiff's employer,

1 and because that bald allegation is contradicted by the plain language of the
 2 franchise agreement, the First Amended Complaint does not establish that
 3 7-Eleven was Plaintiff's employer. Rather, the First Amended Complaint actually
 4 establishes – as a matter of law – that 7-Eleven was not Plaintiff's employer.
 5 Accordingly, the Court should dismiss the Fourth, Fifth and Sixth Causes of
 6 Action in the First Amended Complaint with prejudice.

7 **E. THE COURT SHOULD STRIKE PLAINTIFF'S CLAIM FOR**
 8 **PUNITIVE AND EXEMPLARY DAMAGES.**

9 Plaintiff's First Amended Complaint contains a request for punitive and
 10 exemplary damages. If the Court dismisses Plaintiff's first three causes of action
 11 but allows any other cause of action to proceed, the Court should strike this claim
 12 for relief because punitive and exemplary damages would not be available under
 13 any of the remaining causes of action. A motion to strike under Rule 12(f) is the
 14 appropriate vehicle for eliminating claims for relief that fail as a matter of law.
 15 Johnson v. Metropolitan Sewer Dist., 926 F.Supp. 874, 875 (E.D.Mo. 1996) (citing
 16 2A Moore's Federal Practice ¶ 12.21[1]).

17 "Where a right is created by statute and the statute does not expressly permit
 18 punitive damages, punitive damages under California Civil Code section 3294 are
 19 not available." In re Wal-Mart Stores, Inc. Wage and Hour Litigation, 505
 20 F.Supp.2d at 620 (citing Turnbull & Turnbull v. ARA Transp., Inc., 219
 21 Cal.App.3d 811, 826-27 (1990); Czechowski v. Tandy Corp. 731 F.Supp. 406, 410
 22 (N.D.Cal. 1990)). The Northern District of California has granted a motion to
 23 strike to punitive damages where the only claims in the complaint arise under the
 24 California Labor Code or Section 17200. Id. at 620-21.

25 If the Court grants 7-Eleven's motion for judgment on the pleadings as to the
 26 first three causes of action in the First Amended Complaint, no basis would remain
 27 for the imposition of punitive damages against 7-Eleven. The only surviving
 28 claims would arise under the California Labor Code or Section 17200. Under

1 those circumstances, it would be appropriate for the Court to strike Plaintiff's
2 demand for punitive and exemplary damages.

3 **IV. CONCLUSION**

4 For the foregoing reasons, and for the reasons stated in 7-Eleven's Notice of
5 Motion and Motion, 7-Eleven respectfully requests that the Court grant its motion
6 for judgment on the pleadings and dismiss the First Amended Complaint with
7 prejudice.

8
9 DATED: February 1, 2008

WELTER LAW FIRM, P.C.

10
11 By:

/s/ Eric A. Welter

ERIC A. WELTER

12
13
14 Attorneys for Defendant
15 7-ELEVEN, INC.
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28